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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1707

UNITED TRANSPORTATION UNION, an Unincorporated Labor Union, and C. M. CAGLE,
Petitioners,

v.

ATLANTA AND WEST POINT RAIL ROAD COMPANY and WESTERN RAILWAY OF ALABAMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF

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INDEX

	Page
Introduction	1
The May 7 Agreement Did Not Make the Case Moot	2
The Case Is Not Moot for Any of the Other Reasons Cited	6
Conclusion	9

TABLE OF CITATIONS

Cases

Bus Employees v. Missouri, 374 U.S. 74, 10 L.ed. 2d 763, 83 S.Ct. 1657 (1963) 5, 6

Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 21 L.ed 2d 325, 89 S.Ct. 347 (1968) 4, 5, 7

Chicago & Northwestern R. Co. v. United Transportation Union, ... U.S. ..., 39 L.W. 4641 (June 1, 1971) 3

Liner v. Jafco, 375 U.S. 301, 11 L.ed 2d 347, 84 S.Ct. 391 (1964) 6

Local 1976, U.B.C. & J. v. N.L.R.B., 357 U.S. 93, 2 L.ed 2d 1186, 78 S.Ct. 1011 (1958) 6

McLeod v. General Electric Co., 385 U.S. 533, 17 L.ed 2d 588, 87 S.Ct. 637 (1969) 5, 6

Oil, Chemical & Atomic Workers International Union v. Missouri, 361 U.S. 363, 4 L.ed 2d 373, 80 S.Ct. 391 (1960) 5, 6

Powell v. McCormack, 395 U.S. 486, 23 L.ed 2d 491, 89 S.Ct. 1944 (1969) 6

Southern P. Terminal Co. v. I. C. C., 219 U.S. 498, 55 L.ed 310, 31 S.Ct. 379 (1911) 5

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 1 L.ed 2d 972, 77 S.Ct. 912 (1957) 6

United States v. W. T. Grant Co., 345 U.S. 629, 97 L.ed 1303, 73 S.Ct. 894 (1953) 6

Statutes

Norris-LaGuardia Act, 47 Stat. 72, 29 U.S.C.A., § 104 ..... 4, 5, 7, 8

Railway Labor Act, 45 U.S.C.A., § 151, et seq. 4, 8

Rule 65.1, Federal Rules of Civil Procedure 6

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INTRODUCTION

Petitioners respectfully urge the Court to consider this Supplemental Brief in reply to the response to the Petition for Certiorari. This reply is made necessary by the major reliance by the respondents upon their contention that the case has become moot by reason of the agreement signed on May 7, 1971. On the day that agreement was signed counsel was away from the city and the Petition for Certiorari was at the printer's. We have had no op-

portunity to address ourselves to the question of the effect of the May 7th agreement.

In addition, respondents argue that the case is moot by virtue of certain other circumstances. These latter contentions were presented to the Court of Appeals by means of a motion to dismiss the appeal but were ignored by that Court in its opinion. It did not seem appropriate to anticipate them in the petition. Since they have now been raised in this Court a brief comment is in order.

The May 7th Agreement Did Not Make the Case Moot

The agreement is not a final settlement of the underlying labor dispute. It provides, in part, as follows:

Section 8:

> "This agreement is made without prejudice to the position of either party with respect to any pending or future litigation and/or negotiation and will not be cited or referred to by either party or their representatives in negotiations on this railroad or any railroad or in national handling without written consent of the other party, except as may be necessary to assure compliance with the terms of this agreement."

Section 10(a):

> "This agreement is not to be used to determine the number of members to be assigned to any crew. It is an interim settlement of the notice served upon the Carrier by the Union on November 15, 1965, dealing with a training program subject to the conditions contained in this Section 10."

Insofar as it is possible for the parties to preserve their dispute for judicial determination, therefore, petitioners and respondents herein have preserved theirs. It may be that the case or controversy requirement of the Constitu-

tion precludes the parties from having complete control over this issue, but at least it is clear that they sought to preserve it.

The agreement is characterized by the parties as an "interim settlement." The reason is not far to seek. The union negotiated with both hands behind its back since it was restrained by what it regarded and regards as a plainly unlawful injunction. Since it was so restrained it took a good deal less than its otherwise would have and was unwilling that the agreement should be more than an "interim" settlement. The words of Mr. Justice Brennan, dissenting in **Chicago & Northwestern R. Co. v. United Transportation Union**, ... U.S. ..., 39 L.W. 4641 (June 1, 1971), are apt:

> "More important, however, is the mortal wound today's holding inflicts on the critical role to be played by the presence of economic weapons in reserve. **NLRB v. Insurance Agents**, *supra*, at 488-489. As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings, after the termination of the entire bargaining process, or worse yet, at each step thereof, the threat of its use becomes impotent, indeed."

(This is only one of numerous instances when members of this Court have recognized the important role that the right to strike can play, not only in producing a **just** agreement but in facilitating the process of reaching any agreement at all.)

Because the parties have regarded their settlement as an interim one, and because the union is dissatisfied with the interim resolution imposed upon it with the aid of the

injunctive power of the District Court, there will necessarily be further discussions on the Section 6 notice that started this whole dispute, unless the carrier is as successful in the future at avoiding negotiations as it has been in the past. This will be true whether this Court regards the present dispute as "moot" or not. The carrier has candidly admitted, on numerous occasions, including its brief to the Court of Appeals and its brief in this Court (p. 14), that any effort by the Union to strike will be met by an injunction. (The carrier repeatedly asserts—see p. 23 of its brief in response to the petition for certiorari—that the union is barred from striking not only by the injunction but "by the Railway Labor Act itself." That very contention, that the Railway Labor Act is somehow self-executing, as though the members of the union would be struck by lightning if they struck in violation of it, shows that this dispute is not moot. Because it begs the very issue presented in the petition, namely, the relationship of the Railway Labor Act to the Norris-LaGuardia Act. Our contention is that the union can strike and can only be enjoined if (1) the strike violates the Railway Labor Act and (2) the carrier satisfies the District Court that its (the carrier's) hands are clean within the meaning of Section 8 of Norris-LaGuardia. The respondents' reply, which seems incomplete or unresponsive, is that "the Railway Labor Act itself" forbids a strike and therefore (sic) our contention need not be ruled upon.)

The District Court, by issuing an injunction while assuming that the carrier was **solely** at fault for the failure of the parties to have had negotiations, has shown its willingness to disregard Section 8 of the Norris-LaGuardia Act. The unlawful injunction, therefore, continues to play a substantial role in the dispute between the parties. In that circumstance, **Carroll v. Commissioners of Princess Anne**, 393 U.S. 175, 21 L.ed 2d 325, 89 S.Ct. 347 (1968),

is directly in point. In that case this Court reviewed, in 1968, the propriety of a ten-day restraining order which was issued and had expired in 1966. Against an argument of mootness the Court noted

> "that the decision of the Maryland Court of Appeals [sustaining the validity of the restraining order] continues to play a substantial role in the response of the officials to [petitioners'] activities." 393 U.S. at 178.

The **Carroll** case relied, on the mootness issue, upon **Bus Employees v. Missouri**, 374 U.S. 74, 10 L.ed 2d 763, 83 S.Ct. 1657 (1963), which concerned a labor dispute; it did not announce a doctrine peculiarly applicable to First Amendment cases.

Reliance by respondents upon **Oil, Chemical & Atomic Workers International Union v. Missouri**, 361 U.S. 363, 4 L.ed 2d 373, 80 S.Ct. 391 (1960), and **McLeod v. General Electric Co.**, 385 U.S. 533, 17 L.ed 2d 588, 87 S.Ct. 637 (1969), is misplaced. In **Oil, Chemical** the underlying labor dispute had been finally settled. Here it has not; the action of the parties in limiting their settlement to recognize the existence of a continuing dispute is critical. The **Bus Employees** case, *supra*, distinguished **Oil, Chemical** on precisely this ground. The **McLeod** case may also be distinguished on the same ground. The important difference is that in deciding that the **Oil, Chemical** case was moot this Court was careful to avoid speculation about future issues that might never arise. In the **Carroll** case, on the other hand, and in **Southern P. Terminal Co. v. I.C.C.**, 219 U.S. 498, 55 L.ed 310, 31 S.Ct. 379 (1911), and in **Bus Employees**, *supra*, the Court recognized that the mere fact of expiration of an injunction could not make a dispute moot, and acknowledged, as well, that if there were a distinct threat of recurring use of the injunction in similar future circumstances, that threat provided a basis for

jurisdiction. So long as there continues to be a live controversy, the case is not moot. That is the case here.

To the same effect, see also **Local 1976, U.B.C. & J. v. N.L.R.B.**, 357 U.S. 93, 2 L.ed 2d 1186, 78 S.Ct. 1011 (1958), n. 2 (threat of recurring violation prevents mootness), and **United States v. W. T. Grant Co.**, 345 U.S. 629, 97 L.ed 1303, 73 S.Ct. 894 (1953), (party claiming mootness must carry the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated").

Even if the agreement were a final settlement of the labor dispute the case would not be moot. So long as one issue remains unresolved, the constitutional requirement of a case or controversy is supplied and the case is not moot. **Powell v. McCormack**, 395 U.S. 486, 23 L.ed 2d 491, 89 S.Ct. 1944 (1969). Should this Court determine that the lower Court erred in issuing the preliminary injunction, petitioners will be able to proceed summarily by motion against Respondent and its surety for payment of its costs and damages arising from the injunction. Rule 65.1, Federal Rules of Civil Procedure. Therefore, regardless of any final settlement of the underlying labor dispute if the injunction was unlawful, respondents' liability to petitioners on its bond is sufficient to prevent the case from being moot. **Liner v. Jafco**, 375 U.S. 301, 11 L.ed 2d 347, 84 S.Ct. 391 (1964); see also **Textile Workers Union of America v. Lincoln Mills of Alabama**, 353 U.S. 448, 1 L.ed 2d 972, 77 S.Ct. 912 (1957).

The Case Is Not Moot for Any of the Other Reasons Cited

Respondents argue, as they did in the Court below, that the case is moot because the injunction has "expired," and because the union "could not lawfully strike" (p. 14) at this time, and because the carrier, having argued that

the injunction has expired would be estopped to try to enforce it at this time.

We will comment briefly on each of these arguments. However, they were presented to and rejected by the Court of Appeals and they seem to be subordinate to, if not swallowed up by, the argument that the signing of the May 7, 1971 agreement makes the case moot. If that argument fails the subordinate arguments should also fail.

(a) The injunction has not expired by its terms. It provides that it will continue in force "until . . . further order of the Court" and there has been no such order. Respondents contend that the union could have such an order for the asking: all we have to do is say that the parties have complied with the Act and settled their dispute. However, we have already seen that the dispute is not settled and the union contends that the Carrier has not complied with the Act and that an interim unsatisfactory settlement has been forced upon the union with the aid of the injunction. In light of these contentions, obviously we cannot make the necessary representations to the District Court and get the injunction lifted.

(b) The case is not moot because the union "could not lawfully strike" anyway. The circularity of that argument is obvious. It presupposes an automatic issuance of an injunction in a labor dispute. We have argued in the petition for certiorari that the Norris-LaGuardia Act has something to do with this case. That argument cannot be rendered moot by the assumption that a District Court in a new case will issue a new injunction in spite of the Norris-LaGuardia Act. In fact, to the extent that it is probable that the District Court **would** again ignore the Norris-LaGuardia Act there exists the danger of recurring improper injunctions which, under **Carroll** and the other cases we have cited above, prevents the case from being moot.

(c) The case is not moot because the carrier, having argued that the injunction has expired, would be estopped from enforcing it. Although it does argue that the injunction has expired, the carrier declares in the same breath that a new injunction can be had for the asking because "the Railway Labor Act itself" prohibits a strike. Thus, the union can derive but cold comfort from that argument. The carrier, therefore, has not carried the heavy burden of showing that there is no danger of another unlawful injunction. On the contrary, it argues that the previous injunction was lawful and that is the issue on the merits.

Petitioners asserted the right to strike on three separate grounds: (1) the refusal of the carrier to bargain; (2) the execution of an agreement by the carrier with the Brotherhood of Locomotive Engineers, which agreement effected a change in the working conditions of petitioner's members, without complying with the Railway Labor Act; and (3) that the actions of the carrier had the purpose (and might have the effect) of destroying the U.T.U. and forcing its members into the B.L.E.

The mootness arguments pressed by the Respondents do not address themselves to the second and third issues at all. No claim is made that the benefits of the unlawful deal with the B.L.E. have been disgorged since the preliminary injunction hearing. No claim is made that the agreement is not still in effect. Of course the appellee disagrees with our contention that it deal with the B.L.E. changed the working conditions of the members of the U.T.U. However, that is a matter for this Court to consider on the whole record; it is certainly not moot.

Likewise, the third ground urged in the petition claims that Section 8 of the Norris-LaGuardia Act precludes an injunction because the whole record shows a pattern of favoritism toward the B.L.E. as against the U.T.U. The

ultimate object of the Carrier is to destroy the firemen's union (and the craft of fireman) and thus influence its employees to choose the B.L.E. as bargaining representative. Naturally this contention is disputed. But nothing has happened to make it moot.

CONCLUSION

Petitioners urge the Court to grant the writ and consider the case on the merits. It is a matter of very great importance both to the parties and to the railroad industry.

Respectfully submitted

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